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Attorneys for Non-Party  
Deborah A. Klar

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

DENNIS MONTGOMERY, and the  
MONTGOMERY FAMILY TRUST,

3:06-CV-00056-PMP-VPC  
Base File

Plaintiffs,

3:06-CV-00145-PMP-VPC

v.

**NOTICE OF APPEAL**

ETREPPID TECHNOLOGIES, L.L.C.,  
WARREN TREPP, and the UNITED STATES  
DEPARTMENT OF DEFENSE, et al.


Defendants.

AND ALL RELATED MATTERS.

DEBORAH A. KLAR ("Ms. Klar"), by and through counsel, Gary R. Goodheart, Esq., of Jones Vargas, hereby gives notice of her appeal to the United States Court of Appeals for the Ninth Circuit from an Order on Deborah Klar's Objections to Magistrate Judge's Order (Doc. 1150), entered in the above-entitled action on April 5, 2010.

DATED this 26 day of April, 2010.

JONES VARGAS

By:   
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## CERTIFICATE OF SERVICE

Pursuant to Fed.R.Civ.P.5(b), and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of JONES VARGAS, and that the foregoing document was served via electronic service on the 26th day of April, 2010 to the following parties:

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17 **3:06-cv-56 Notice has been delivered by other means to:**

18  
19  
20 Opspring, LLC  
21 600 106th Avenue NE, Ste 210  
22 Bellevue, WA 98004-5045

23 Edra Blixseth  
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/s/ Barbara Seed  
An employee of Jones Vargas

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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

DENNIS MONTGOMERY, and the  
MONTGOMERY FAMILY TRUST,

3:06-CV-00056-PMP-VPC  
Base File

Plaintiffs,

3:06-CV-00145-PMP-VPC

v.

**REPRESENTATION STATEMENT**

ETREPPID TECHNOLOGIES, L.L.C.,  
WARREN TREPP, and the UNITED STATES  
DEPARTMENT OF DEFENSE, et al.

Defendants.

AND ALL RELATED MATTERS.

The undersigned represents DEBORAH KLAR, appellant in this matter, and no other party.  
Below is a service list showing all parties to this action and indicating counsel of record to each  
party, pursuant to Fed.R.App.P. 12(b) and Circuit Rule 3-2(b).

**COUNSEL OF RECORD**

**PARTIES:**

**REPRESENTED BY:**

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Co-Defendant:  
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DATED this 26 day of April, 2010.

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## Form 6. Civil Appeals Docketing Statement


USCA DOCKET # (IF KNOWN)

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT  
CIVIL APPEALS DOCKETING STATEMENT**

PLEASE ATTACH ADDITIONAL PAGES IF NECESSARY.

<b>TITLE IN FULL:</b> DENNIS MONTGOMERY, et al.  <div style="text-align: right;">Plaintiffs,</div> v.  ETREPPID TECHNOLOGIES, LLC, et al,  <div style="text-align: right;">Defendants.</div>	<table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td colspan="2"><b>DISTRICT:</b> Nevada</td> <td colspan="2"><b>JUDGE:</b> Philip M. Pro</td> </tr> <tr> <td colspan="4"><b>DISTRICT COURT NUMBER:</b> 3:06-cv-0056-PMP-VPC</td> </tr> <tr> <td colspan="2"><b>DATE NOTICE OF APPEAL FILED:</b> 04/26/10</td> <td colspan="2"><b>IS THIS A CROSS-APPEAL?</b>    <input type="checkbox"/> YES</td> </tr> <tr> <td colspan="4"> <b>IF THIS MATTER HAS BEEN BEFORE THIS COURT PREVIOUSLY, PLEASE PROVIDE THE DOCKET NUMBER AND CITATION (IF ANY):</b>             n/a         </td> </tr> </table>	<b>DISTRICT:</b> Nevada		<b>JUDGE:</b> Philip M. Pro		<b>DISTRICT COURT NUMBER:</b> 3:06-cv-0056-PMP-VPC				<b>DATE NOTICE OF APPEAL FILED:</b> 04/26/10		<b>IS THIS A CROSS-APPEAL?</b> <input type="checkbox"/> YES		<b>IF THIS MATTER HAS BEEN BEFORE THIS COURT PREVIOUSLY, PLEASE PROVIDE THE DOCKET NUMBER AND CITATION (IF ANY):</b>  n/a			
<b>DISTRICT:</b> Nevada		<b>JUDGE:</b> Philip M. Pro															
<b>DISTRICT COURT NUMBER:</b> 3:06-cv-0056-PMP-VPC																	
<b>DATE NOTICE OF APPEAL FILED:</b> 04/26/10		<b>IS THIS A CROSS-APPEAL?</b> <input type="checkbox"/> YES															
<b>IF THIS MATTER HAS BEEN BEFORE THIS COURT PREVIOUSLY, PLEASE PROVIDE THE DOCKET NUMBER AND CITATION (IF ANY):</b>  n/a																	
<b>BRIEF DESCRIPTION OF ACTION AND RESULT BELOW:</b> Please see attached sheet for description of action and result below.																	
<b>PRINCIPAL ISSUES PROPOSED TO BE RAISED ON APPEAL:</b> Please see attached sheet for principal issues to be raised on appeal.																	
<b>PLEASE IDENTIFY ANY OTHER LEGAL PROCEEDING THAT MAY HAVE A BEARING ON THIS CASE (INCLUDE PENDING DISTRICT COURT POST-JUDGMENT MOTIONS):</b>  Flynn v. Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP et al, D. Nev., Case No. 3:09-cv-00422-ECR-RAM; Chapter 7 Bankruptcy Petition of Dennis and Brenda Montgomery, U.S. Bankruptcy Court, C.D. Cal. Case No. 09-24322; Motion to Conform Order of Magistrate Judge to Order of District Judge and Amended Motion for Sanctions by Interested Party Michael Flynn, D.Nev. Case No. 3:06-cv-0056-PMP-VPC.																	
<b>DOES THIS APPEAL INVOLVE ANY OF THE FOLLOWING:</b> <input type="checkbox"/> Possibility of settlement <input type="checkbox"/> Likelihood that intervening precedent will control outcome of appeal <input type="checkbox"/> Likelihood of a motion to expedite or to stay the appeal, or other procedural matters (specify)   <input type="checkbox"/> Any other information relevant to the inclusion of this case in the Mediation Program     <input type="checkbox"/> Possibility parties would stipulate to binding award by Appellate Commissioner in lieu of submission to judges.																	

<b>LOWER COURT INFORMATION</b>				Page 2 of 2
JURISDICTION		DISTRICT COURT DISPOSITION		
FEDERAL	APPELLATE	TYPE OF JUDGMENT / ORDER APPEALED	RELIEF	
<input checked="" type="checkbox"/> FEDERAL QUESTION  <input type="checkbox"/> DIVERSITY  <input type="checkbox"/> OTHER (SPECIFY)	<input type="checkbox"/> FINAL DECISION OF DISTRICT COURT  <input checked="" type="checkbox"/> INTERLOCUTORY DECISION APPEALABLE AS OF RIGHT  <input type="checkbox"/> INTERLOCUTORY ORDER CERTIFIED BY DISTRICT JUDGE (SPECIFY):  <input type="checkbox"/> OTHER (SPECIFY):	<input type="checkbox"/> DEFAULT JUDGMENT <input type="checkbox"/> DISMISSAL / JURISDICTION <input type="checkbox"/> DISMISSAL / MERITS <input type="checkbox"/> SUMMARY JUDGMENT <input type="checkbox"/> JUDGMENT / COURT DECISION <input type="checkbox"/> JUDGMENT / JURY VERDICT <input type="checkbox"/> DECLARATORY JUDGMENT <input type="checkbox"/> JUDGMENT AS A MATTER OF LAW <input checked="" type="checkbox"/> OTHER (SPECIFY):  Order Regarding Magistrate Judge's Order Regarding Contempt Sanctions	<input type="checkbox"/> DAMAGES: SOUGHT \$ _____ AWARDED \$ _____ <input type="checkbox"/> INJUNCTIONS: <input type="checkbox"/> PRELIMINARY <input type="checkbox"/> PERMANENT <input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED  <input type="checkbox"/> ATTORNEY FEES: SOUGHT \$ _____ AWARDED \$ _____ <input type="checkbox"/> PENDING  <input type="checkbox"/> COSTS: \$ _____	

CERTIFICATION OF COUNSEL
<p><b>I CERTIFY THAT:</b></p> <ol style="list-style-type: none"> <li>1. COPIES OF ORDER / JUDGMENT APPEALED FROM ARE ATTACHED.</li> <li>2. A CURRENT SERVICE LIST OR REPRESENTATION STATEMENT WITH TELEPHONE AND FAX NUMBERS IS ATTACHED ( SEE 9<sup>TH</sup> CIR. RULE 3-2</li> <li>3. A COPY OF THIS CIVIL APPEALS DOCKETING STATEMENT WAS SERVED IN COMPLIANCE WITH FRAP 25.</li> <li>4. I UNDERSTAND THAT FAILURE TO COMPLY WITH THESE FILING REQUIREMENTS MAY RESULT IN SANCTIONS, INCLUDING DISMISSAL OF THIS APPEAL.</li> </ol> <div style="display: flex; justify-content: space-between; margin-top: 20px;"> <div style="text-align: center;">             Signature         </div> <div style="text-align: center;"> <u>April 26, 2010</u>            Date         </div> </div>

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<p style="text-align: center;">* THIS DOCUMENT SHOULD BE FILED IN THE DISTRICT COURT WITH THE NOTICE OF APPEAL*</p> <p style="text-align: center;">* IF FILED LATE, IT SHOULD BE FILED DIRECTLY WITH THE U.S. COURT OF APPEALS*</p>



**Appellant Deborah Klar's Attachment To Civil Appeal Docketing Statement**

Dennis Montgomery, et al, v. ETreppid Technologies, LLC, et al.  
Case No. 3:06-cv-0056-PMP-VPC

**Brief Description of Action and Result Below:**

This appeal arises from Appellant Deborah Klar's ("Ms. Klar") Objections to a Magistrate Judge's Order, entered after final judgment, which imposed contempt sanctions against Ms. Klar, including holding Ms. Klar personally jointly and severally liable for more than \$200,000 in attorneys' fees, ordering Ms. Klar to perform one hundred hours of community service, and suspending her from practicing in the United States District Court, District of Nevada, for five years' time. In its ruling on the Objections made by Ms. Klar, the district court erroneously held that the Magistrate Judge's imposition of contempt sanctions was a non-dispositive order under 28 U.S.C. § 636(b)(1)(A), rather than a dispositive matter that could only be heard in the first instance by the Magistrate Judge with Ms. Klar's consent. Further, the Magistrate Judge failed to certify the facts constituting contempt to the District Judge and failed to serve an order requiring Ms. Klar to appear before the District Judge to show cause why she should not have been adjudged by the District Judge to be in contempt.

Although the district court sustained Ms. Klar's Objections on due process grounds, it did so without prejudice to further proceedings before the Magistrate Judge on the contempt sanctions issue. The case, therefore, was permitted to continue before the Magistrate Judge, when the Magistrate Judge has no authority to determine the matter absent Ms. Klar's consent.

This appeal is taken under the collateral order doctrine. *Cohen v. Beneficial Indus. Loan Co.*, 337 U.S. 541, 546 (1949).

**Principal Issues Proposed to be Raised on Appeal:**

Did the district court err in holding that the Magistrate Judge's Order imposing contempt sanctions against Ms. Klar was a non-dispositive matter under 28 U.S.C. § 636(b)(1)(A), rather than a dispositive matter under 28 U.S.C. § 636(b)(1)(B) that the Magistrate Judge had no authority to determine absent Ms. Klar's consent?

Did the district court err in holding that the Magistrate Judge's Order entered after final judgment was a non-dispositive matter under 28 U.S.C. § 636(b)(1)(A)?

Did the district court err in permitting further proceedings regarding contempt sanctions before the Magistrate Judge when the Magistrate Judge has no authority to determine such matters absent Ms. Klar's consent to the Magistrate Judge's jurisdiction?

Did the district court err in permitting further proceedings regarding contempt sanctions before the Magistrate Judge, where, pursuant to 28 U.S.C. § 636(e), the Magistrate Judge lacked authority to exercise the civil or criminal contempt authority of the district court and the Magistrate Judge failed to certify the facts constituting contempt to the District Judge and failed to serve an order requiring Ms. Klar to appear before the District Judge to show cause why she should not have been adjudged by the District Judge to be in contempt?

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

DENNIS MONTGOMERY and the  
MONTGOMERY FAMILY TRUST,

Plaintiffs,

v.

ETREPPID TECHNOLOGIES, LLC;  
WARREN TREPP; and the UNITED  
STATES DEPARTMENT OF DEFENSE,

Defendants.

AND ALL RELATED MATTERS.

3:06-CV-00056-PMP-VPC  
BASE FILE

3:06-CV-00145-PMP-VPC

ORDER

Presently before the Court is the Objections of Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP to Order Re: Motion for Sanctions (Doc. #1035) with supporting declaration (Doc. #1036), filed on May 11, 2009. Interested Party Michael Flynn filed a Response (Doc. #1102) on June 25, 2009.

Also before the Court is the Objections of Dennis Montgomery to Order Re: Motion for Sanctions (Doc. #1037) with supporting declaration (Doc. #1038), filed on May 11, 2009. Interested Party Michael Flynn filed a Response (Doc. #1099) on June 25, 2009.

Also before the Court is Teri Pham's Objection to Magistrate Judge's Order (Doc. #1040), filed on May 11, 2009. A supporting letter (Doc. #1050) was filed on May 15, 2009, and an errata (Doc. #1051) was filed on May 19, 2009. Non-Party Deborah Klar filed a Joinder (Doc. #1057) on May 27, 2009. Interested Party Michael Flynn filed a

1 Response (Doc. #1098) on June 25, 2009. Teri Pham filed a Notice of Relevant New Case  
2 Law (Doc. #1127) on October 9, 2009.

3 Also before the Court is the Objections of Non-Party Deborah A. Klar to  
4 Findings of Magistrate Judge in Stayed Order Re: Motion for Sanctions (Doc. #1042) with  
5 supporting declaration (Doc. #1043), filed on May 11, 2009. Interested Party Michael  
6 Flynn filed a Response (Doc. #1100) on June 25, 2009. Deborah Klar filed a Notice of  
7 Relevant Case Law (Doc. #1128) on October 19, 2009.

## 8 **I. BACKGROUND**

9 This case arises out of a dispute between Dennis Montgomery ("Montgomery")  
10 and Warren Trepp ("Trepp") over the ownership of certain computer software codes.  
11 During the course of the underlying actions, Montgomery terminated the representation of  
12 his counsel, refused to pay his former counsel's attorneys' fees, and sought the return of his  
13 client file. Montgomery obtained new counsel who represented him both in the underlying  
14 action and in various efforts to obtain his client file from his former counsel.  
15 Montgomery's former counsel ultimately filed a motion for sanctions in this Court against  
16 Montgomery and his new counsel for, among other things, their conduct in seeking to  
17 obtain the client file in various other forums. The Magistrate Judge in this action, the  
18 Honorable Valerie P. Cooke, held an evidentiary hearing and subsequently awarded  
19 sanctions against Montgomery, his new counsel, and new counsels' law firm. The  
20 sanctioned parties object to the sanctions award.

21 The underlying lawsuits commenced when Trepp filed suit in Nevada state court  
22 on January 19, 2006. (Status Report (Doc. #16 in 3:06-CV-00145-PMP-VPC).) On  
23 January 31, 2006, Montgomery filed suit against Trepp in this Court. (Compl. (Doc. #1).)<sup>1</sup>

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26 <sup>1</sup> Citations are to the base file docket in this case, 3:06-CV-00056-PMP-VPC, unless otherwise indicated.



1 In the state court action, Montgomery asserted a third party claim against the United States  
2 Department of Defense. (Notice of Removal (Doc. #1 in 3:06-CV-00145-PMP-VPC), Ex.  
3 1.) The Department of Defense removed the state court action to this Court. (Notice of  
4 Removal (Doc. #1 in 3:06-CV-00145-PMP-VPC).) The Court subsequently consolidated  
5 these two actions. (Mins. of Proceedings (Doc. #123).)

6 Prior to removal to this Court, the state court held a preliminary injunction  
7 hearing. (Snyder Decl. (Doc. #33 in 3:06-CV-00145-PMP-VPC), Trans. of Proceedings.)  
8 At that hearing, Montgomery was represented by local counsel Ronald Logar ("Logar") and  
9 Eric Pulver ("Pulver"), as well as Michael Flynn ("Flynn"), who was appearing pro hac  
10 vice. (Id.; Verified Pet. for Permission to Practice Pro Hac Vice (Doc. #9 in 3:06-CV-  
11 00145-PMP-VPC).) Flynn's pro hac vice petition identified a Massachusetts bar number  
12 for Flynn, and listed his address in California. (Verified Pet. for Permission to Practice Pro  
13 Hac Vice (Doc. #9 in 3:06-CV-00145-PMP-VPC).) At the hearing, which Montgomery  
14 attended in person, Logar introduced Flynn to the state court as "a member of the  
15 Massachusetts Bar," indicated that Flynn had applied for pro hac vice status, and stated that  
16 the Massachusetts bar had sent a certificate of good standing to the Nevada State Bar. (Id.  
17 at 5-6.) Logar requested the court permit Flynn to appear at the hearing, and the state court  
18 permitted it. (Id.)

19 Around this same time period, the Federal Bureau of Investigation sought and  
20 obtained search warrants to search Montgomery's house and several storage units.  
21 (Application & Aff. for Search Warrant (Doc. #1, #4, #6, #8, #10, #12 in 3:06-CV-00263-  
22 PMP-VPC).) Montgomery subsequently filed a motion to unseal the search warrant  
23 affidavits and for the return of his property. (Mot. to (1) Unseal Search Warrant Affs.; (2)  
24 For the Return of Property; and (3) For the Segregation and Sealing of All Attorney-Client  
25 & Trade Secret Materials Seized (Doc. #21 in 3:06-CV-00263-PMP-VPC).)

26 ///

1 In the search warrant proceedings, the United States moved in February 2007 to  
2 strike pleadings filed by Flynn and to preclude Flynn's pro hac vice admission in the case.  
3 (Gov't's Mot. to Strike (Doc. #110 in 3:06-CV-00263-PMP-VPC).) The Government  
4 contended that Flynn was admitted pro hac vice only in the related civil suits, not in the  
5 search warrant proceedings. (Id. at 2.) The Government further contended that Flynn  
6 should not be admitted because his pro hac vice petitions in the consolidated civil actions  
7 contained what the Government asserted were misleading statements. (Id.) Specifically,  
8 the Government argued that although the application stated Flynn was licensed only in  
9 Massachusetts, Flynn actually maintained a residence and phone number in California, and  
10 practiced in California. (Id. at 2-4.) The Government included as an exhibit a February 7,  
11 2007 letter which Flynn wrote on Montgomery's behalf to certain high ranking government  
12 officials. (Id., Ex. 1.) On the letterhead beneath Flynn's name it states "admitted only in  
13 Massachusetts." (Id.)

14 Flynn, Logar, and Pulver opposed the motion on Montgomery's behalf.  
15 (Montgomery's Opp'n to the Gov't's Mot. to Strike (Doc. #113 in 3:06-CV-00263-PMP-  
16 VPC).) In support of the opposition, Flynn filed a declaration in which he averred that he is  
17 a member of the Massachusetts bar, he maintains residences in both Massachusetts and  
18 California, and he maintains an office address in Boston, Massachusetts. (Flynn Decl.  
19 (Doc. #114 in 3:06-CV-00263-PMP-VPC) at 1-3.) Flynn also included two letters he sent  
20 in February 2007 on Montgomery's behalf to various government officials which stated  
21 beneath his name that he was admitted only in Massachusetts. (Id., Exs. 1-2.)

22 Montgomery also filed a declaration in support of the opposition, which hereafter  
23 will be referred to as the February 2007 Declaration. (Montgomery Decl. (Doc. #115 in  
24 3:06-CV-00263-PMP-VPC).) Montgomery averred, among other things, that he had read  
25 the motion to disqualify Flynn, that he had read letters Flynn had sent on Montgomery's  
26 behalf to government officials, that the Government's attempt to remove Flynn "would

1 gravely damage” his constitutional protections, and that Flynn was Montgomery’s counsel  
2 of choice due to Flynn’s “experience, integrity, and litigation expertise.” (Id. at ¶¶ 4, 13-  
3 14.)<sup>2</sup> Montgomery attached as an exhibit to his declaration a March 1, 2006 letter Flynn  
4 sent to various government officials on Montgomery’s behalf. (Id., Ex. 1.) The letterhead  
5 states beneath Flynn’s name, “only admitted in Massachusetts.” (Id.)

6 This Court denied the motion to strike Flynn’s filings in the search warrant  
7 proceedings. (Order (Doc. #122 in 3:06-CV-00263-PMP-VPC).) The Court also ordered  
8 the entire search warrant proceedings, which up to this point had been sealed, to be  
9 unsealed subject to objections by the United States regarding the states secret privilege and  
10 objections by the parties to the civil action regarding trade secrets or other privileges. (Id.)  
11 The Court set forth a procedure by which the United States would complete review and  
12 redaction of the privileged material in the search warrant proceedings, after which the  
13 parties to the civil cases would have access to the redacted materials. (Order (Doc. #147 in  
14 3:06-CV00056-PMP-VPC).) The parties then would have a certain period of time within  
15 which to review the materials and assert any objections to the unsealing of any unredacted  
16 materials. (Id.)

17 Montgomery filed an objection to the Government’s decision not to redact certain  
18 information which Montgomery contended was protected by the states secret privilege.  
19 (Montgomery’s Opp’n to the Gov’t’s Designations of State Secrets & Classified  
20 Information in the Search Warrant Case File (Doc. #168).) At a hearing on the parties’  
21 various objections, Flynn proposed submitting a declaration signed by Montgomery under  
22 oath which stated, among other things, that an attached exhibit was a true and correct copy  
23 of an email. (Mins. of Proceedings (Doc. #188).) The Court permitted the Trepp parties  
24

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25 <sup>2</sup> The February 2007 Declaration contains two paragraphs numbered “13” and “14.” The Court  
26 refers to paragraphs 13 and 14 contained on page 8 of the Declaration.

1 and the Government to review the declaration and file any objections thereto. (Mins. of  
2 Proceedings (Doc. #188).) The Government determined that Montgomery's declaration  
3 contained material subject to the states secrets privilege and the related protective order  
4 entered in the case, and provided redactions thereto. (United States' Notice of Filing (Doc.  
5 #197).) The Trepp parties also filed an objection, claiming that the email which  
6 Montgomery averred was a "true and accurate copy" of the original was fabricated. (Defs.  
7 eTreppid Tech., LLC & Warren Trepp's Notice of Obj. to the Public Filing of a Fabricated  
8 Document by Dennis Montgomery (Doc. #198).)

9 On July 9, 2007, Flynn and out-of-state co-counsel Carla DiMare<sup>3</sup> ("DiMare")  
10 moved to withdraw as Montgomery's attorneys. (Ex Parte Mot. to Withdraw as Counsel for  
11 Montgomery (Doc. #204).) Flynn and DiMare gave as grounds for their withdrawal that  
12 Montgomery breached an obligation for payment of fees and engaged in conduct that made  
13 continued representation unreasonably difficult. (Id.)

14 In response to Flynn's motion to withdraw, the United States requested Flynn's  
15 withdrawal be subject to various conditions related to the protection of states secrets  
16 privileged materials that may be contained in Flynn's client files. (United States' Response  
17 to Ex Parte Mot. to Withdraw as Counsel for Montgomery (Doc. #209).) Montgomery,  
18 through Logar and Pulver, indicated he did not oppose Flynn's motion to withdraw, and he  
19 already had retained the law firm of Liner Yankelevitz Sunshine & Regenstrief LLP ("Liner  
20 Firm") to substitute into the case. (Pls.' Reply to Michael J. Flynn's & Carla A. DiMare's  
21 Mot. to Withdraw & the United States' Response Thereto (Doc. #213).) Montgomery  
22 opposed the Government's efforts to place as conditions upon Flynn's withdrawal a  
23 governmental review of the client file because such a review would intrude on attorney-  
24 client privileged materials. (Id.) Montgomery also made reference to Nevada and

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25  
26 <sup>3</sup> DiMare was admitted pro hac vice in this Court on February 6, 2007. (Order (Doc. #113).)



1 California professional rules of conduct which he contended would require Flynn to turn  
2 over the client file to Montgomery. (Id.) Montgomery supported this filing with a  
3 declaration from Deborah Klar (“Klar”), a partner of the Liner Firm. (Id., Klar Decl.) Klar  
4 averred that the Liner Firm was ready, willing, and able to substitute into the case upon  
5 receipt of the client file from Flynn. (Id.) Klar requested the Court reject the Government’s  
6 requested conditions on Flynn’s withdrawal and “require Mr. Flynn and Ms. DiMare to turn  
7 over all client files in their possession.” (Id.)

8           On July 31, the Court set an August 17 date for hearing Flynn’s motion to  
9 withdraw. (Min. Order (Doc. #223).) On August 1, Montgomery filed a notice with the  
10 Court indicating that Flynn and DiMare had been terminated as counsel of record. (Notice  
11 of Termination of Counsel (Doc. #227).)

12           On August 3, Klar and another partner of the Liner Firm, Teri Pham (“Pham”),  
13 filed a Complaint in Los Angeles Superior Court on Montgomery’s behalf against Flynn  
14 (the “LA Action”). (Request for Judicial Notice (Doc. #262), Ex. 1.) The Complaint  
15 alleged that Flynn led Montgomery to believe that Flynn was licensed to practice law in  
16 California, and that “[t]hroughout the course of his representation, Flynn held himself out to  
17 [Montgomery] as a California lawyer.” (Id.) The Complaint further alleged that Flynn  
18 refused to return the client file and that Flynn has “threatened to disclose, and has disclosed  
19 confidential and privileged attorney-client communications to others.” (Id.) The Complaint  
20 sought as relief a preliminary injunction requiring Flynn to return the client file and  
21 enjoining Flynn from disclosing privileged communications to any third party. (Id.)

22           On August 6, Flynn removed the LA Action to the United States District Court  
23 for the Central District of California and sought transfer to this Court. (Request for Judicial  
24 Notice (Doc. #275), Ex. 2.) Two days later, Flynn lodged a number of exhibits regarding  
25 his representation of Montgomery which he contended demonstrated he consistently  
26 represented himself as an attorney licensed only in Massachusetts. (Tr. (Doc. #873) at

1 217).)

2 On August 14, the Liner Firm entered an appearance in the action on  
3 Montgomery's behalf, subject to the approval of a pro hac vice application. (Notice of  
4 Assoc. of Counsel (Doc. #236).) That same date, Liner Firm partners Klar and Pham filed  
5 petitions for pro hac vice admission, and the Court granted the petitions. (Verified Pets.  
6 (Doc. #233, #234); Orders (Doc. #237, #239).)

7 Also on that same date, Flynn filed a declaration in this Court referencing the LA  
8 Action and attaching as an exhibit Flynn's motion to dismiss that action against him.  
9 (Flynn Decl. (Doc. #240).) In the motion to dismiss in the LA Action, Flynn identified  
10 various statements in the LA Action Complaint which he contended were false, specifically  
11 with respect to Montgomery's knowledge about Flynn's status as admitted to practice only  
12 in Massachusetts. (Id., Ex. 1.)

13 On August 17, Flynn and DiMare filed in this action notices of liens and/or  
14 retaining liens for unpaid fees and costs. (Notices (Doc. #243, #245).) Flynn asserted over  
15 \$600,000 in unpaid fees. (Id.)

16 That same date, the Court held a hearing on Flynn's motion to withdraw as  
17 Montgomery's counsel in this action. (Mins. of Proceedings (Doc. #247).) At the hearing,  
18 the undersigned indicated the Court was aware of the LA Action, but indicated the Court  
19 did not have "the details of that and don't know to the extent to which I have to." (Tr. of  
20 Hrg. (Doc. #267) at 4-5.) Klar advised the Court that Montgomery had a pending suit in  
21 California regarding turnover of the client file. (Id. at 12.) Klar stated that Montgomery  
22 understood Flynn was California counsel, and that under both California and Massachusetts  
23 law, there is no authority for a retaining lien. (Id.) As to the scope of documents which  
24 Klar was seeking, Klar indicated Montgomery gave Flynn original documents which had  
25 not been returned. (Id. at 19.) However, Klar had access to local counsel's file, which  
26 consisted of pleadings and exhibits filed with the Court. (Id. at 19-20.) Additionally, Flynn

1 indicated that much of the representation was performed via emails between Flynn and  
2 Montgomery, many of which were copied to Logar and Pulver. (Id. at 20-21.) Flynn  
3 estimated that he had maybe one or two original documents of Montgomery's. (Id. at 22.)  
4 When the Court questioned Klar about the emails, Klar responded that she did have access  
5 to Montgomery's emails. (Id. at 23-24.)

6 At the hearing, the Court questioned Flynn regarding the fee and file dispute and  
7 whether the Court should--

8 more appropriately simply leave that issue to the court in California  
9 that's addressing the lawsuit between counsel, including, I would  
10 imagine, fees and with some secure knowledge that while it may not  
11 constitute a bond, it's a forum, in which your fee interests and  
12 Montgomery's position on the matter can be vindicated. Why do we  
13 need to tie this litigation up with regard to a fee dispute, if that fee  
14 dispute is encompassed in the relationship of attorney/client as  
15 encompassed in the California litigation?

16 (Id. at 25.) Flynn responded by noting, among other things, that the LA Action did not  
17 involve a fee dispute. (Id. at 27.) Rather, the action only sought injunctive relief for return  
18 of the file and to enjoin Flynn from disclosing privileged materials. (Id. at 27-28.) The  
19 Court took the matter under submission. (Mins. of Proceedings (Doc. #247).)

20 On August 21, Flynn filed a motion for attorneys' fees and costs in this Court,  
21 seeking the outstanding fees and costs owed to Flynn and DiMare for their work in the  
22 underlying action. (Mot. for Attorney Fees & Costs (Doc. #248).) On August 31,  
23 Montgomery filed an objection to Flynn's notice of lien, asserting the parties' attorney-  
24 client relationship was governed by California law which does not permit retaining liens,  
25 the amount of fees requested was unreasonable, an action already was pending in the Los  
26 Angeles Superior Court regarding the attorney-client relationship between the parties, Flynn  
was licensed to practice only in Massachusetts which does not allow retaining liens, and  
even under Nevada law Flynn was not entitled to a retaining lien because he voluntarily  
withdrew. (Notice of Obj. to Notice of Lien (Doc. #254).)

1 On August 22, the United States District Court for the Central District of  
2 California denied Montgomery's motion to transfer the case to this Court, and ordered the  
3 action remanded to the Los Angeles Superior Court. (Request for Judicial Notice (Doc.  
4 #262), Ex. 3.) The court remanded for lack of diversity jurisdiction, finding Flynn failed to  
5 establish more than \$75,000 was at stake with respect to the requested injunctive relief.

6 (Id.)

7 On September 4, the undersigned issued an order granting Flynn's motion to  
8 withdraw. (Order (Doc. #256).) In the Order, the Court noted that the Government sought  
9 to condition Flynn's withdrawal on four conditions in relation to protection of state secrets  
10 privileged material potentially residing in Flynn's files. (Id.) The Court also noted the  
11 dispute between Flynn and Montgomery's new counsel over the turnover of the client file.

12 (Id.) The Court granted the motion to withdraw subject to two of the Government's  
13 requested conditions, but denied the Government's other two requested conditions. (Id.)

14 As for the client file dispute, the Court stated:

15 to the extent the Montgomery Plaintiffs seek to condition the  
16 withdrawal of Flynn and DiMare on Flynn and DiMare surrendering  
17 their complete "client file" to new counsel of record for Plaintiffs  
18 (Doc. #213), said precondition is rejected by the Court. In this regard,  
19 the record before the Court does not support a finding that Flynn and  
20 DiMare have withdrawn "voluntary" [sic] as counsel for Montgomery  
Plaintiffs, In the Matter of Kaufman, 93 Nev. 452, 567 P.3d 957  
(1977), nor does it appear on the record before the Court that Flynn  
and DiMare should be compelled to surrender their files to new  
counsel of record. Figliuzzi v. Fed. Dist. Court, 111 Nev. 338, 890  
P.2d 798 (1995).

21 (Id.)

22 On September 7, Montgomery filed an application for arbitration of the fee  
23 dispute with the San Diego County Bar Association. (Request for Judicial Notice (Doc.  
24 #262), Ex. 2.) The application is signed by Montgomery and indicates he will be  
25 represented by Klar and Pham of the Liner Firm. (Id.) In the statement of facts section,  
26 Montgomery asserted that Flynn held himself out as a California attorney throughout the



1 representation. (Id.)

2           On September 10, Klar and Pham filed on Montgomery's behalf an opposition to  
3 Flynn's motion for attorneys' fees in this action. (The Montgomery Parties' Opp'n to  
4 Michael J. Flynn's Mot. for Attorneys Fees & Costs (Doc. #261).) In support, Klar and  
5 Pham attached a declaration by Montgomery, hereinafter referred to as the September 2007  
6 Declaration. (Id., Montgomery Decl.) In the September 2007 Declaration, Montgomery  
7 made the following statements:

8           • "Mr. Flynn led me to believe at that time and throughout the course of his  
9 representation that he was a California attorney, and I believed that I was engaging a  
10 California lawyer to represent me. Specifically, he told me he had a law firm, Flynn &  
11 Stillman, in California, and I met with him at his offices in Cardiff, California." (Id. at ¶ 3.)

12           • "[a]ll of the papers he filed with the Court listed a California address." (Id. at  
13 ¶ 6.)

14           • "At no time did Mr. Flynn ever inform me that he was not and is not licensed to  
15 practice in the State of California, or that he is licensed to practice only in Massachusetts. I  
16 only learned of this after I retained new counsel." (Id. at ¶ 7.)

17           On September 12, Klar and Pham, on Montgomery's behalf, filed an ex parte  
18 application for writ of possession in the LA Action. (Request for Judicial Notice (Doc.  
19 #597, Ex. 2.) Montgomery requested that court to "enter an immediate routine turnover  
20 order and Writ of Possession." (Id. at 2.) On September 13, the Los Angeles Superior  
21 Court heard Montgomery's ex parte application for writ of possession in chambers. (Exs. to  
22 Flynn Decl. (Doc. #548), Ex. 3.) Montgomery withdrew the ex parte application and  
23 subsequently noticed the motion for hearing, which was set for October 18. (Id., Request  
24 for Judicial Notice (Doc. #597), Ex. 4, Ex. 7 at 3.)

25           On September 18, Klar and Pham filed on Montgomery's behalf an emergency  
26 request for clarification of this Court's September 4 Order. (Emergency Ex Parte

1 Application for Clarification of Order (Doc. #274).) Montgomery referenced the LA  
2 Action and stated that Flynn was asserting the position in the LA Action that this Court  
3 already had adjudicated the issue of the disposition of Montgomery's client file. (Id.)  
4 Montgomery argued the Court had made no such ruling and the parties had not briefed the  
5 issue, including which state law would apply to the dispute. (Id.) Montgomery requested  
6 the opportunity to brief the issue in the event the Court intended to adjudicate the issue.  
7 (Id.)

8 On that same date, in the LA Action, Pham submitted a memorandum of points  
9 and authorities in support of Montgomery's Application for Writ of Possession. (Request  
10 for Judicial Notice (Doc. #275), Ex. 4.) Pham filed a declaration similar to the September  
11 2007 Declaration in support. (Id., Montgomery Decl.)

12 On September 25, Montgomery filed a request for an investigation of Flynn with  
13 the Massachusetts State Bar. (Request for Judicial Notice (Doc. #597), Ex. 13.) In the  
14 request for investigation, Montgomery stated that "[a]t all times during the representation,  
15 Flynn led the Montgomery Parties to believe that he was authorized to practice law in  
16 California." (Id.)

17 On October 4, the undersigned denied Montgomery's motion for clarification of  
18 the September 4 Order. (Order (Doc. #291).) The Court stated that the prior order was  
19 "clear and unambiguous, dealing solely with the matter then before the Court as to whether  
20 to condition Flynn's withdrawal as an attorney in this matter on the return of Montgomery's  
21 client file." (Id.) The Court further noted that Montgomery "has not moved in this Court  
22 for return of his client files under Nevada or any other applicable law. The Court's denial  
23 of Montgomery's Motion for Clarification therefore is without prejudice to file a fully  
24 briefed motion for return of the file, including any argument that law other than Nevada's  
25 applies to such an inquiry." (Id.)

26 ///

1           On October 12, the Magistrate Judge entered an order regarding Flynn's motion  
2 for attorneys' fees. (Order (Doc. #296).) In that Order, the Magistrate Judge referenced the  
3 LA Action and, in a footnote, stated that "in the face of the District Court's September 4,  
4 2007 order that Flynn and DiMare would not be compelled to surrender their files to new  
5 counsel of record . . . , Montgomery has continued to pursue another forum to adjudicate the  
6 fee dispute, namely California. In his California Superior Court action, Montgomery seeks  
7 relief that is contrary to the District Court's order." (Id. at 3 n.3.) In a separate footnote,  
8 the Magistrate Judge acknowledged that Montgomery's new counsel had indicated  
9 Montgomery had or would file complaints with the California and/or Massachusetts State  
10 Bars. (Id. at 5 n.5.) The Magistrate Judge stated, "[t]he court takes no position on the  
11 propriety of such potential complaints. By this order, this court only takes jurisdiction over  
12 the attorney's fees and client file dispute." (Id.)

13           The Magistrate Judge granted Flynn's motion for attorneys' fees to the extent that  
14 the Court would determine the amount of fees due, but the Court would not order  
15 Montgomery to pay the fees at that juncture. (Id.) As to the retaining lien issue, the  
16 Magistrate Judge noted that Montgomery never had filed a motion with this Court for return  
17 of his files, and the Court therefore could not order Flynn to return the files absent a motion  
18 by the client and presentation of adequate security or bond for the payment of the fees. (Id.)

19           In conclusion, the Magistrate Judge stated that she had jurisdiction to adjudicate  
20 the amount of attorneys' fees due to Flynn and set forth a procedure by which she would  
21 make that determination. (Id.) With respect to the retaining lien, the Magistrate Judge  
22 stated "the court concludes that should Montgomery desire the client files currently in  
23 Flynn's possession, Montgomery must file a motion requesting the return of the files and  
24 post adequate security or bond." (Id.) The Magistrate Judge further ordered that  
25 Montgomery's counsel "shall deliver, either via facsimile or hand delivery, a copy of this  
26 order to the chambers of the presiding judge" in the LA Action prior to the scheduled

1 October 18 hearing in that action. (Id.)

2           Pham and Klar thereafter attended the October 18 hearing in the LA Action. (Tr.  
3 (Doc. #323).) As directed by the Magistrate Judge, Pham and Klar provided the Magistrate  
4 Judge's October 12 order to the presiding judge in the LA Action. (Notice of Lodging  
5 USDC Nevada Order of Oct. 12, 2007.) At the hearing, Pham stated the Los Angeles  
6 Superior Court was "the only court with jurisdiction to decide whether or not the files  
7 should get turned over because the files are located here in California," and "[o]nly this  
8 court could order the files to get turned over because the files are located here in  
9 California." (Tr. (Doc. #323) at 5-6.) Pham also stated that the only issue before the  
10 Magistrate Judge in this action was the attorneys' fee dispute, "it's not with respect to  
11 possession of the files." (Id. at 9.) Later in the hearing, after DiMare referenced footnote 5  
12 of the Magistrate Judge's October 12 order, Pham stated that she was "not contentesting  
13 that [the Nevada District Court] has jurisdiction, we're simply saying we believe this court  
14 also has jurisdiction, it is concurrent jurisdiction." (Id. at 12-13.)

15           Klar also attended the hearing and suggested government counsel's appearance at  
16 the hearing was to get "another bite at the apple and to try to circumvent [this Court's]  
17 order." (Id. at 8.) Klar stated government counsel was at the hearing "to muddy the waters  
18 and to somewhat intimidate Your Honor to refrain in giving us the relief that we believe  
19 Mr. Montgomery and Mrs. Montgomery and the Montgomery Trust is entitled to." (Id.)  
20 The Los Angeles Superior Court denied Montgomery's motion for writ of possession,  
21 finding that Montgomery had not met his burden of establishing he was entitled to  
22 possession of the client file. (Id. at 13.)

23           On October 31, the Massachusetts State Bar closed Montgomery's bar complaint.  
24 (Exs. to Flynn Decl. (Doc. #548), Ex. 5.) In its letter, the Bar stated that Montgomery "did  
25 not mention in [his] complaint that the United States District Court, District of Nevada,  
26 entered detailed and comprehensive orders with respect to the transmission of the file.



1 Attorney Flynn was admitted pro hac vice in the Nevada Court and as such, in connection  
2 with that proceeding, is subject to the standards of professional conduct as adopted by the  
3 Nevada Supreme Court.” (Id. at 1.) The Bar also noted that the client file may contain state  
4 secrets, and that this Court had maintained jurisdiction over such issues. (Id.)

5 On November 9, the Magistrate Judge held a hearing to discuss with the parties  
6 the fact that although the Court previously had ordered the unredacted materials in the  
7 search warrant proceedings be unsealed, Montgomery’s February 2007 Declaration  
8 inadvertently never was unsealed. (Order (Doc. #270); Mins. of Proceedings (Doc. #331).)  
9 The Magistrate Judge ordered the declaration be unsealed. (Id.)

10 On November 1, the Los Angeles Superior Court dismissed the LA Action. (Exs.  
11 to Flynn Decl. (Doc. #548), Ex. 1.) In dismissing the action, the presiding judge stated:

12 California is only involved in this matter due to an unsubstantiated  
13 allegation by the plaintiff that defendant misrepresented to him that  
14 defendant was licensed to practice in California. This case is before a  
15 California court for the transparent purpose of having this court  
16 countermand the orders of the Nevada District Court. California has  
17 no interest in doing so.

18 (Id. at 3.) Approximately two weeks later, the San Diego Bar Association dismissed  
19 without prejudice the request for arbitration of the fee dispute. (Exs. to Flynn Decl. (Doc.  
20 #548), Ex. 4.) The Bar Association stated that based on the orders of this Court and the Los  
21 Angeles Superior Court, “it is clear that the US District for Nevada has taken control of the  
22 entire case filed by . . . Montgomery including the issue of attorney fees and costs.” (Id.)

23 On March 24, 2008, the Magistrate Judge entered an order granting Flynn’s  
24 motion for attorneys’ fees and costs in the amount of \$557,522.18. (Order (Doc. #502).)

25 On April 24, Flynn moved for sanctions pursuant to 28 U.S.C. § 1927 and/or the Court’s  
26 inherent power against the Montgomery parties and “their counsel of record, Deborah Klar  
and her firm, Liner Yankelevitz Sunshine & Regenstreif, LLP.” (Mot. for Sanctions (Doc.  
#545) at 1.) Among other things, Flynn argued that Montgomery and his counsel

1 vexatiously multiplied the proceedings by attempting to circumvent this Court's Orders  
2 regarding the client files by filing actions or complaints in three different forums and using  
3 the September 2007 Declaration, which Flynn asserted was perjured. (Id. at 2.) Flynn also  
4 contended that Montgomery and his counsel misrepresented this Court's orders at the  
5 October 18 hearing before the Los Angeles Superior Court. (Id. at 3.) Flynn requested over  
6 \$200,000 in attorney's fees for the period of August 1, 2007 through December 5, 2007,  
7 and he requested "the revocation of Ms. Klar's pro hac vice admission in these cases." (Id.  
8 at 24.) Montgomery opposed the motion, and included declarations from Pham and Klar.  
9 (Opp'n to Mot. for Sanctions Filed by Attorney Michael J. Flynn (Doc. #601); Pham Decl.  
10 (Doc. #599); Klar Decl. (Doc. #600).)

11         The Magistrate Judge set an evidentiary hearing related to the motion for  
12 sanctions and indicated the evidentiary hearing would address only the September 2007  
13 Declaration and the Montgomery parties' litigation against Flynn in the LA Action, the San  
14 Diego fee arbitration, and the Massachusetts Bar complaint. (Order (Doc. #770).) The  
15 order required Montgomery to "appear in person and to testify concerning these matters."  
16 (Id.) The order also stated that Flynn, Klar, and Pham "shall attend the hearing in person  
17 and shall be prepared to address the court concerning these matters." (Id.) The Magistrate  
18 Judge held a sealed evidentiary hearing on August 21, at which Montgomery and Pham  
19 testified under oath. (Mins. of Proceedings (Doc. #826).) Klar was present but did not  
20 testify. (Id.)

21         Montgomery and Trepp subsequently settled the underlying lawsuit. (Mins. of  
22 Proceedings (Doc. #856).) After Montgomery defaulted on a payment required under the  
23 settlement agreement, judgments by confession were entered against the Montgomery  
24 parties and other parties in the litigation. (Judgment (Doc. #897, #898).) The Court also  
25 entered judgment on the award of attorneys' fees to Flynn. (Judgment (Doc. #902).)  
26 Subsequent efforts at settling the Flynn fee dispute were unsuccessful. (Mins of

1 Proceedings (Doc. #933).) On February 19, 2009, the Court entered an order dismissing all  
2 claims and counterclaims in the underlying action. (Order (Doc. #962).) However, the  
3 Court retained jurisdiction over, among other things, Flynn's motion for sanctions. (Id.)

4 On March 31, 2009, the Magistrate Judge entered a 54-page order granting  
5 Flynn's motion for sanctions under 28 U.S.C. § 1927 and the Court's inherent power.  
6 (Order (Doc. #985).) The Magistrate Judge sanctioned Montgomery for perjuring himself  
7 in the September 2007 Declaration regarding his knowledge about Flynn's admission status,  
8 and that he signed the declaration "in bad faith, vexatiously, wantonly, and for oppressive  
9 reasons." (Id. at 49.) The Magistrate Judge also sanctioned Klar and Pham, finding that  
10 Klar and Pham "acted in bad faith or conduct tantamount to bad faith with the intention to  
11 undermine this court's orders for the improper purpose of obtaining a more favorable forum  
12 for resolution of the fee dispute and the turnover of the client files." (Id. at 37.) The  
13 Magistrate Judge also sanctioned the Liner Firm, concluding that it allowed Klar to operate  
14 "unchecked and unquestioned," and the Firm "acquiesced to or willingly carried out Ms.  
15 Klar's litigation strategy." (Id. at 48.)

16 Based on her findings, the Magistrate Judge awarded Flynn and DiMare  
17 attorneys' fees in the amount of \$201,990 and costs in the amount of \$2,421. (Id. at 51-52.)  
18 The Magistrate Judge apportioned the sanctions as follows: Klar 50%, Montgomery 30%,  
19 Pham 10%, and the Liner Firm 10%, and imposed joint and several liability among the  
20 sanctioned parties. (Id. at 52.)

21 The Magistrate Judge also imposed non-monetary sanctions on Klar, Pham, and  
22 Montgomery. The Magistrate Judge ordered that the Clerk of Court send a copy of the  
23 sanctions order to the Nevada and California State Bars; that Klar and Pham be prohibited  
24 from applying for pro hac vice admission to this Court for five years, after which time they  
25 may apply but must attach a copy of the sanctions order along with a declaration identifying  
26 all the legal ethics courses they have completed in the interim; that the Court would publish

1 the sanctions order as a form of public reprimand; and that Klar and Pham must perform  
2 200 and 100 hours of pro bono legal services, respectively. (Id. at 52-53.) As to  
3 Montgomery, the Magistrate Judge ordered that a copy of the sanctions order be sent to the  
4 United States Attorney's Office. (Id. at 53.)

5 The Magistrate Judge indicated that pursuant to Local Rule IB 3-1(a), any party  
6 could object to the sanctions order. (Id. at 54.) The Magistrate Judge therefore stayed the  
7 sanction order's effect until after the undersigned issued a final order with respect to any  
8 objections. (Id.) The Liner Firm, Klar, Pham, and Montgomery subsequently filed  
9 objections to the sanctions order.

10 Prior to this Court resolving the objections to the sanctions order, Dennis and  
11 Brenda Montgomery filed a Notice of Filing of Voluntary Petition Under Chapter 7 of the  
12 Bankruptcy Code and of Automatic Stay (Doc. #1104). Flynn moved in the bankruptcy  
13 proceedings for relief from the automatic stay for this Court to rule upon the objections to  
14 the Magistrate Judge's sanctions order. (Status Report Re: Montgomery Bankruptcy (Doc.  
15 #1143).) On January 8, 2010, the United States Bankruptcy Court for the Central District of  
16 California granted Flynn's motion, effective as of December 31, 2009. (Id., Ex. A.) The  
17 stay having been lifted, the Court now will address the various objections to the sanctions  
18 order.

## 19 **II. LEGAL STANDARD**

20 Magistrate judges statutorily are authorized to resolve "pretrial matter[s]" subject  
21 to review by district judges under a clearly erroneous or contrary to law standard. 28 U.S.C.  
22 § 636(b)(1)(A). Excluded from this grant of authority are dispositive motions, such as  
23 motions "for injunctive relief, for judgment on the pleadings, for summary judgment, to  
24 dismiss or quash an indictment or information . . . , to suppress evidence in a criminal case,  
25 to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim  
26 upon which relief can be granted, . . . to involuntarily dismiss an action," and analogous

1 motions. Id.; United States v. Rivera-Guerrero, 377 F.3d 1064, 1067-68 (9th Cir. 2004).

2 Dispositive motions may be submitted to a magistrate judge for a report and  
3 recommendation, which the district court then reviews de novo. 28 U.S.C. § 636(b)(1)(B).

4 Thus, nondispositive pretrial matters are governed by § 636(b)(1)(A) and are  
5 subject to the clearly erroneous or contrary to law standard of review, while dispositive  
6 matters are governed by § 636(b)(1)(B) and are subject to de novo review. Gomez v.  
7 United States, 490 U.S. 858, 873-74 (1989); see also Fed. R. Civ. P. 72(a). Which standard  
8 of review applies is determined by whether the motion's effect properly is characterized as  
9 "dispositive or non-dispositive of a claim or defense of a party." Rivera-Guerrero, 377 F.3d  
10 at 1068 (quotation omitted).

11 The United States Court of Appeals for the Ninth Circuit has not addressed  
12 specifically whether a magistrate judge's order sanctioning a party or counsel under 28  
13 U.S.C. § 1927 or the Court's inherent power is dispositive or non-dispositive. However, the  
14 Ninth Circuit has determined that sanctions under Federal Rules of Civil Procedure 11 and  
15 37 are non-dispositive and thus fall under § 636(b)(1)(A). See Grimes v. City & County of  
16 San Francisco, 951 F.2d 236, 240 (9th Cir. 1991) (Rule 37); Maisonville v. F2 Am., Inc.,  
17 902 F.2d 746, 747-48 (9th Cir. 1990) (Rule 11). The Ninth Circuit has analogized sanctions  
18 under § 1927 and its inherent power to Rule 11 or Rule 37 sanctions. See Stanley v.  
19 Woodford, 449 F.3d 1060, 1064 (9th Cir. 2006) (stating "the policies undergirding Rule  
20 37(a) sanctions are not relevantly different from those justifying sanctions under § 1927 or a  
21 court's inherent powers"); Grimes, 951 F.2d at 240 (indicating there is "no material  
22 distinctions between Rule 11 sanctions and Rule 37 [discovery] sanctions" (quotation  
23 omitted)); Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1412 n.4 (9th Cir. 1990)  
24 ("Although this case involves only a Rule 37 default, we have held that dismissal sanctions  
25 under Rule 37 and a court's inherent powers are similar."). Sanctions under § 1927 or the

26 ///

1 Court's inherent power therefore are non-dispositive,<sup>4</sup> and subject to the clearly erroneous  
2 or contrary to law standard of review.<sup>5</sup>

3 "A finding is clearly erroneous when although there is evidence to support it, the  
4 reviewing body on the entire evidence is left with the definite and firm conviction that a  
5 mistake has been committed." United States v. Ressam, 593 F.3d 1095, 1118 (9th Cir.  
6 2010) (quotation omitted). This Court may not substitute its judgment for that of the  
7 Magistrate Judge. Grimes, 951 F.2d at 241.

### 8 **III. DISCUSSION**

9 The Court has inherent power to sanction counsel or a party who acts "in bad  
10 faith, vexatiously, wantonly, or for oppressive reasons." Leon v. IDX Sys. Corp., 464 F.3d  
11 951, 961 (9th Cir. 2006) (quotation omitted). A court must exercise its inherent powers  
12 "'with restraint and discretion,'" and must make a specific finding of bad faith before  
13 sanctioning under its inherent powers. Yagman v. Republic Ins., 987 F.2d 622, 628 (9th  
14 Cir. 1993) (quoting Chambers v. Nasco, 501 U.S. 32, 44 (1991)); Fink v. Gomez, 239 F.3d  
15 989, 992-93 (9th Cir. 2001). Bad faith "includes a broad range of willful improper  
16 conduct," including "delaying or disrupting the litigation or . . . hampering enforcement of a  
17 court order." Fink, 239 F.3d at 992 (quotation omitted); Leon, 464 F.3d at 961. "Sanctions  
18 are available for a variety of types of willful actions, including recklessness when combined  
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20 <sup>4</sup> To the extent a sanction imposed is case dispositive, such as striking an answer or entering  
21 a default, then the sanctions order would be dispositive, and would be subject to de novo review.

22 <sup>5</sup> Other circuits have disagreed or are undecided as to the appropriate standard of review for  
23 a magistrate judge's award of sanctions. See Kiobel v. Millson, 592 F.3d 78, 86 (2d Cir. 2010)  
24 (declining to decide the issue, but in three separate concurring opinions expressing the view that the  
25 de novo standard applied, the clearly erroneous or contrary to law standard applied, or that Congress  
26 or the Supreme Court ought to make the standard clear); Retired Chicago Police Ass'n v. City of Chicago, 76 F.3d 856, 869 (7th Cir. 1996) (holding "a sanctions request is a dispositive matter capable  
of being referred to a magistrate judge only under § 636(b)(1)(B) or § 636(b)(3), where the district  
judge must review the magistrate judge's report and recommendations de novo"); Bennett v. Gen.  
Caster Serv. of N. Gordon Co., Inc., 976 F.2d 995, 998 (6th Cir. 1992) (same).



1 with an additional factor such as frivolousness, harassment, or an improper purpose.” Fink,  
2 239 F.3d at 994. Indeed, the Court may exercise its inherent power to sanction a party or  
3 attorney who acts for an improper purpose even if the sanctioned act “consists of making a  
4 truthful statement or a non-frivolous argument or objection.” Gomez v. Vernon, 255 F.3d  
5 1118, 1134 (9th Cir. 2001) (quotation omitted). Whether to impose sanctions under the  
6 Court’s inherent power lies within the Court’s discretion. Id.

7 In addition to inherent powers, the Court may sanction an attorney under 28  
8 U.S.C. § 1927 for unreasonably and vexatiously prolonging the proceedings. To impose  
9 sanctions under § 1927, the Court must make a finding that counsel acted with subjective  
10 bad faith. B.K.B. v. Maui Police Dep’t, 276 F.3d 1091, 1107 (9th Cir. 2002);  
11 Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F.3d 1112, 1118 (9th Cir.  
12 2000). The standard is met when “an attorney knowingly or recklessly raises a frivolous  
13 argument, or argues a meritorious claim for the purpose of harassing an opponent.” B.K.B.,  
14 276 F.3d at 1107 (quotation and emphasis omitted). Whether to impose sanctions under  
15 § 1927 lies within the Court’s discretion. In re Keegan Mgmt. Co., Sec. Litig., 78 F.3d 431,  
16 435 (9th Cir. 1996).

17 **A. Liner Firm**

18 The Liner Firm contends the Magistrate Judge sanctioned it only under § 1927,  
19 and § 1927 provides for sanctions only against an attorney, not a law firm. Flynn responds  
20 that the Magistrate Judge intended to sanction the Liner Firm under both the Court’s  
21 inherent power and § 1927, and indicated in the order that the Firm acted in bad faith.  
22 Flynn also argues sanctions may be awarded against a law firm under § 1927.

23 Although the sanctions order generally referenced both § 1927 and the Court’s  
24 inherent powers, the sanctions order imposed sanctions against the Liner Firm only pursuant  
25 to § 1927. (Order (Doc. #982) at 48 (stating “sanctions against the Liner Firm are  
26 warranted pursuant to 28 U.S.C. § 1927”).) The sanctions order referenced both the Court’s

1 inherent power and § 1927 when grouping the sanctioned parties together. For example, page one  
2 of the order states that the “court concludes that the conduct of the Liner firm and its attorneys, Ms.  
3 Klar and Ms. Pham, was willfully reckless, intended to harass, done for an improper purpose, and  
4 was suffused with bad faith.” (*Id.* at 1.) On page 51, the order stated: “[b]ased on the foregoing,  
5 the court finds that pursuant to its inherent powers and 28 U.S.C. § 1927, the following sanctions  
6 shall issue.”<sup>6</sup> (*Id.* at 51.) The order then itemized the sanctions against all of the sanctioned parties,  
7 including the Liner Firm. (*Id.* at 51-53.) However, in the order’s discussion specifically related to  
8 the Liner Firm, the order cited only § 1927 and did not make an explicit finding of bad faith on the  
9 Firm’s part. To the extent the Magistrate Judge intended to sanction the Liner Firm under the  
10 Court’s inherent power, the sanctions order does not make that intention clear.

11 Section 1927 provides:

12 Any attorney or other person admitted to conduct cases in any court of  
13 the United States or any Territory thereof who so multiplies the  
14 proceedings in any case unreasonably and vexatiously may be required  
by the court to satisfy personally the excess costs, expenses, and  
attorneys’ fees reasonably incurred because of such conduct.

15 Some Circuit Courts of Appeal have permitted § 1927 sanctions against a law firm, but  
16 have done so without analyzing whether such sanctions are permissible under the statutory  
17 language. See Jensen v. Phillips Screw Co., 546 F.3d 59, 61-69 (1st Cir. 2008); LaPrade v.  
18 Kidder Peabody & Co., Inc., 146 F.3d 899, 904-07 (D.C. Cir. 1998); Avirgan v. Hull, 932  
19 F.2d 1572, 1582 (11th Cir. 1991); Baker Indus., Inc. v. Cerberus Ltd., 764 F.2d 204, 208-09  
20 (3d Cir. 1985). In contrast, the Sixth and Seventh Circuits have indicated that § 1927  
21 sanctions are not awardable against a law firm based on the statute’s plain language. See  
22 Rentz v. Dynasty Apparel Indus., Inc., 556 F.3d 389, 396 n.6 (6th Cir. 2009); Claiborne v.

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23  
24 <sup>6</sup> This sentence could not mean the Magistrate Judge intended to sanction all of the parties  
25 under both sources of authority, as Montgomery is a party and thus is not sanctionable under § 1927.  
26 F.T.C. v. Alaska Land Leasing, Inc., 799 F.2d 507, 510 (9th Cir. 1986) (stating § 1927 “does not  
authorize recovery from a party”).

1 Wisdom, 414 F.3d 715, 722-23 (7th Cir. 2005). The United States Court of Appeals for the  
2 Ninth Circuit has not decided whether a law firm, as opposed to an individual attorney, may  
3 be sanctioned under § 1927, although it has indicated § 1927 sanctions were not permissible  
4 against a non-profit organization that varyingly described itself as a representative of the  
5 plaintiffs, an employer of the plaintiffs' lawyers, and as the entity directing the litigation.  
6 Lockary v. Kayfet, 974 F.2d 1166, 1168-70 (9th Cir. 1992) (stating the district court  
7 recognized it did not have the power to sanction the non-profit entity under § 1927).

8 When construing a statute, the Court begins with the statute's plain language.  
9 Moreno-Morante v. Gonzales, 490 F.3d 1172, 1175 (9th Cir. 2007). If the language is  
10 unambiguous, the Court's inquiry is complete. Alvarado v. Cajun Operating Co., 588 F.3d  
11 1261, 1268 (9th Cir. 2009.)

12 Section 1927 by its plain terms applies only to an "attorney or other person  
13 admitted to conduct cases in any court of the United States." A law firm is not an attorney.  
14 Nor is it a person admitted to conduct cases in federal courts. "Individual lawyers, not  
15 firms, are admitted to practice before both the state courts and the federal courts."  
16 Claiborne, 414 F.3d at 723. Further, the statute requires the sanctioned person to "satisfy  
17 personally" the costs and expenses incurred as a result of the sanctionable conduct.

18 The conclusion that § 1927 does not apply to law firms is supported by the  
19 United States Supreme Court's analysis of whether a prior version of Federal Rule of Civil  
20 Procedure 11 applied to law firms. In Pavelic & LeFlore v. Marvel Entertainment Group,  
21 the Supreme Court held that Rule 11's plain language permitted the imposition of sanctions  
22 on "the person who signed" the paper at issue. 493 U.S. 120, 123 (1989). Because the Rule  
23 required an attorney or unrepresented party to sign the paper in his or her "individual  
24 name," the Supreme Court concluded that the signature requirement, and the consequences  
25 attached thereto, ran to the individual attorney and not to his or her law firm. Id. at 123-24.  
26 Following this decision, Rule 11 was amended to allow sanctions against law firms. See

1 Fed. R. Civ. P. 11(c)(1) (“If, after notice and a reasonable opportunity to respond, the court  
2 determines that Rule 11(b) has been violated, the court may impose an appropriate sanction  
3 on any attorney, law firm, or party that violated the rule or is responsible for the  
4 violation.”); see also Fed. R. Bankr. P. 9011(c) (listing law firms among persons or entities  
5 that may be sanctioned).

6 The Court therefore concludes § 1927 sanctions may not be imposed against a  
7 law firm. The Magistrate Judge’s order imposing such sanctions thus is contrary to law. In  
8 re Keegan Mgmt. Co., Sec. Litig., 78 F.3d at 435 (“For a sanction to be validly imposed, the  
9 conduct in question must be sanctionable under the authority relied on.” (quotation  
10 omitted)). The Liner Firm’s objection to the sanctions order is affirmed, and the sanctions  
11 order as to the Liner Firm is reversed without prejudice to any further proceedings  
12 consistent with this Order with respect to Flynn’s motion for sanctions.<sup>7</sup>

### 13 **B. Montgomery**

14 Montgomery argues the sanctions against him are based on perceived differences  
15 in his two declarations, but there is insufficient evidence to support a finding that the  
16 September 2007 Declaration was made in bad faith. Montgomery argues his two  
17 declarations do not contradict each other because the February Declaration does not  
18 mention anything about where Flynn was licensed. Even if the declarations are  
19 inconsistent, Montgomery contends the evidence adduced at the evidentiary hearing  
20 demonstrated Montgomery did not understand what it meant to be licensed or admitted in a  
21 certain jurisdiction and the significance of that in relation to practicing law in a particular  
22 state. Montgomery further argues his September 2007 Declaration does not amount to  
23 perjury because the record does not disclose what Montgomery meant by referring to Flynn  
24

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25 <sup>7</sup> Because the Court affirms the Liner Firm’s objections on this basis, the Court need not  
26 address the Liner Firm’s other objections.

1 as a "California lawyer" and in any event, the statements were not material. Montgomery  
2 also argues he cannot be sanctioned for conduct occurring outside the proceedings in this  
3 Court, the Magistrate Judge failed to assess the reasonableness of Flynn's fees, and she  
4 should not have made liability joint and several. Finally, Montgomery requests that in the  
5 event any further proceedings are necessary, the Court assign a different Magistrate Judge.

6 Flynn responds that there is clear and convincing evidence that the September  
7 2007 Declaration is perjured, as evidenced by the exhibits on file which show Montgomery  
8 knew Flynn was licensed only in Massachusetts based on various documents in the record.  
9 Flynn further argues that because Montgomery did not raise below his inability to pay, that  
10 argument is waived. As to joint and several liability, Flynn contends it is appropriate  
11 because Montgomery, Klar, and Pham were jointly engaged in the misconduct at issue.  
12 Finally, Flynn argues the request for a new judge is unsupported, as the Magistrate Judge  
13 has been unbiased in this action, ruling against Flynn on several occasions, and Flynn  
14 contends she could have sanctioned the objecting parties even more than she did. Flynn  
15 requests the Court modify the sanctions award to include fees expended in having to  
16 respond to the various objections to the Sanctions.

17 1. The September 2007 Declaration

18 Under the federal perjury statute, a person commits perjury when he "willfully  
19 subscribes as true any material matter which he does not believe to be true" in a declaration  
20 signed under penalty of perjury. 18 U.S.C.A. § 1621. A declarant's statement under oath or  
21 affirmation violates this statute if he makes a false statement concerning a material matter  
22 "with the willful intent to provide false testimony, rather than as a result of confusion,  
23 mistake, or faulty memory." United States v. Dunnigan, 507 U.S. 87, 94 (1993).

24 The Magistrate Judge's finding that Montgomery perjured himself is not clearly  
25 erroneous or contrary to law. Montgomery filed the September 2007 Declaration under  
26 penalty of perjury. Montgomery's statements in the September 2007 Declaration regarding

1 Flynn's representations to Montgomery about Flynn's status as a California attorney were  
2 material because Montgomery was attempting to convince this Court, and other forums, that  
3 the file and fee disputes should be heard somewhere other than in this District. The  
4 September 2007 Declaration was filed in support of Montgomery's opposition to Flynn's  
5 motion for attorneys' fees. In that motion, Montgomery argued that California, not Nevada,  
6 was the proper forum to resolve the fee dispute and cited the September 2007 Declaration in  
7 support. (The Montgomery Parties' Opp'n to Michael J. Flynn's Mot. for Attorneys Fees &  
8 Costs (Doc. #261) at 2-5.)

9         The Magistrate Judge held an evidentiary hearing in this matter at which  
10 Montgomery testified. In the sanctions order, she made an adverse credibility finding  
11 against Montgomery regarding his understanding of the words "admitted" or "licensed."  
12 (Order (Doc. #985).) The Magistrate Judge concluded Montgomery knew or should have  
13 know what that meant because he attended the preliminary injunction hearing in state court  
14 at which Flynn's admission and ability to practice in front of the Nevada state court was  
15 discussed in front of Montgomery. (Id. at 18.) Even if Montgomery was not aware then, he  
16 certainly was by February 2007, when the United States attempted to disqualify Flynn based  
17 on the fact that Flynn was licensed only in Massachusetts, but allegedly was practicing in  
18 California. (Id. at 19.)

19         These findings are not clearly erroneous or contrary to law. The Magistrate  
20 Judge presided over the evidentiary hearing and thus had an opportunity to observe  
21 Montgomery's demeanor while testifying. She thus uniquely was situated to evaluate  
22 Montgomery's credibility. Moreover, the adverse credibility finding has ample support in  
23 the record. Montgomery attended the preliminary injunction hearing and was present while  
24 local counsel introduced Flynn to the state court as a member of the Massachusetts Bar,  
25 indicated that Flynn had applied for pro hac vice status, and stated that the Massachusetts  
26 Bar had sent a certificate of good standing to the Nevada State Bar.



1 Further, Montgomery was aware of and participated in opposing the  
2 Government's efforts to disqualify Flynn on the very basis that Flynn's pro hac vice  
3 application contained misstatements because Flynn was licensed only in Massachusetts, but  
4 was residing and practicing in California. In his February 2007 Declaration, Montgomery  
5 averred that he had read both the motion to disqualify Flynn, and letters which Flynn had  
6 sent to high ranking officials on Montgomery's behalf. The Government's motion stated  
7 that Flynn was licensed only in Massachusetts. One of the referenced letters was attached  
8 as an exhibit to Montgomery's own declaration. On the letterhead it states beneath Flynn's  
9 name "only admitted in Massachusetts."

10 At the sealed evidentiary hearing on the motion for sanctions, Montgomery  
11 testified that he "probably" read Flynn's declaration in February 2008 in which Flynn stated  
12 that he was licensed only in Massachusetts. (Sealed Tr. (Doc. #873) at 26.) Montgomery  
13 subsequently stated that he did not know whether he read it at the time. (Id. at 26-27.)  
14 When questioned about reading the Government's motion to disqualify in which the  
15 Government raised the issue that Flynn had only a Massachusetts license and not a  
16 California license, Montgomery stated "What's that mean to me? That didn't mean to me  
17 that you couldn't practice in California." (Id. at 29.) Montgomery further testified that he  
18 did not know what the term "licensed" meant, and he "assumed" Flynn could practice in  
19 California, even though Flynn did not represent Montgomery in any California courts at any  
20 time during the representation. (Id. at 40.) When questioned regarding whether, in their  
21 first meeting, Flynn advised Montgomery that Flynn was licensed in Massachusetts,  
22 Montgomery responded "[w]hether [Flynn] said [he was] licensed in Massachusetts, didn't  
23 mean to me that [Flynn wasn't] in California." (Id. at 42.)

24 When asked whether it was his position that he never saw Flynn's letterhead that  
25 stated "admitted only in Massachusetts," Montgomery stated, "[n]o. That is not my  
26 testimony." (Id. at 49-50.) When asked directly whether he had ever seen any letters

1 stating “admitted only in Massachusetts,” Montgomery answered, “Yes.” (Id. at 50.)  
2 Montgomery’s counsel offered to stipulate that Montgomery had received letters with the  
3 letterhead on it. (Id. at 87, 101-02.) Montgomery also stated that he “must have seen”  
4 Flynn’s Massachusetts bar number next to Flynn’s name on numerous pleadings on file in  
5 this Court. (Id. at 129.)

6 The course of the proceedings, Montgomery’s February 2007 Declaration, and  
7 his testimony at the evidentiary hearing support the Magistrate Judge’s adverse credibility  
8 finding against Montgomery regarding his professed lack of knowledge as to the meaning  
9 of “admitted” or “licensed.” Montgomery is not an unsophisticated individual, and even if  
10 he had no understanding regarding what these terms meant prior to this litigation, the  
11 evidence shows he knew what it meant by the time he filed the February 2007 Declaration  
12 in support of his opposition to the Government’s motion to disqualify. The Magistrate  
13 Judge’s conclusion that Montgomery therefore perjured himself in the September 2007  
14 Declaration when he averred that Flynn led him to believe throughout the course of  
15 representation that Flynn was a California attorney, that at no time did Flynn ever inform  
16 Montgomery that Flynn was licensed to practice only in Massachusetts, and that  
17 Montgomery learned of Flynn’s status only this after he retained new counsel is neither  
18 clearly erroneous nor contrary to law. Perjury is sufficient grounds for a bad faith finding to  
19 support a sanction under the Court’s inherent power. Whitney Bros. Co. v. Sprafkin, 60  
20 F.3d 8, 14 (1st Cir. 1995).

## 21 2. Joint and Several Liability

22 A court may hold sanctioned parties jointly and severally liable. Hyde & Drath v.  
23 Baker, 24 F.3d 1162, 1172 (9th Cir. 1994). Pursuant to general tort law, joint and several  
24 liability is appropriate when the independent tortious conduct of each of two or more  
25 persons is a legal cause of a single and indivisible harm to the injured party. Restatement  
26 (Third) of Torts § A18 (2000). That the Court may apportion fault “does not render an

1 indivisible injury ‘divisible’ for purposes of the joint and several liability rule.” Rudelson  
2 v. U.S., 602 F.2d 1326, 1332 n.2 (9th Cir. 1979) (quotation omitted). Joint and several  
3 liability as between a client and his or her attorney may be appropriate where the client  
4 willfully participates in the sanctionable conduct. See Avirgan v. Hull, 125 F.R.D. 189,  
5 190-91 (S.D. Fla. 1989).

6 The Magistrate Judge’s decision to make the award joint and several is not  
7 clearly erroneous or contrary to law. Although Montgomery’s Declaration was not filed in  
8 this Court until September 2007, the “facts” therein were the foundation for the efforts to  
9 pursue the fee and file disputes in three other forums. The Complaint in the LA Action, the  
10 petition for arbitration of the fee, and the Massachusetts Bar complaint all referenced  
11 Montgomery’s assertion that Flynn held himself out to Montgomery as a California lawyer  
12 throughout Flynn’s representation of Montgomery. The harm to Flynn was indivisible,  
13 even if the Magistrate Judge found the relative fault as between Montgomery and his  
14 attorneys was capable of being apportioned.

### 15 3. Power to Sanction for Conduct Outside Court Proceedings

16 Contrary to Montgomery’s position, the Court has inherent power to sanction a  
17 party’s misconduct occurring outside the Court’s proceedings so long as the sanctionable  
18 conduct has a “nexus with the conduct of the litigation before the court.” United States v.  
19 Wunsch, 84 F.3d 1110, 1115-16 (9th Cir. 1996) (holding that court had inherent power to  
20 sanction attorney who had appeared in case and sent sexist letter to opposing counsel  
21 following his disqualification from the case but concluding no sanction was authorized  
22 under cited local rules); see also Chambers v. NASCO, Inc., 501 U.S. 32, 57 (1991)  
23 (“Chambers challenges the District Court’s imposition of sanctions for conduct before other  
24 tribunals, including the FCC, the Court of Appeals, and this Court, asserting that a court  
25 may sanction only conduct occurring in its presence. Our cases are to the contrary,  
26 however.”). For example, the Court may invoke its inherent power to sanction conduct

1 occurring before a federal agency. See Gadda v. Ashcroft, 377 F.3d 934, 947 (9th Cir.  
2 2004) (“We hold that we also have inherent authority respecting the suspension and  
3 disbarment of attorneys who perform incompetently in federal immigration proceedings.”);  
4 In re Pacific Land Sales, Inc., 187 B.R. 302, 312 (9th Cir. BAP 1995) (stating a court “may  
5 hold a party in contempt for actions performed before the FCC”). The Court also may  
6 sanction conduct in related state court proceedings. Western Sys., Inc. v. Ulloa, 958 F.2d  
7 864, 873 (9th Cir. 1992).

8           Montgomery’s reliance on Atchison, Topeka and Santa Fe Railway Company v.  
9 Hercules Inc. is misplaced. In that case, the Ninth Circuit held that a district court may not  
10 use its inherent power to dismiss a separate action not pending before it where the Federal  
11 Rules of Civil Procedure specifically granted the litigant the right to proceed in the separate  
12 action. 146 F.3d 1071, 1074 (9th Cir. 1998). As the Magistrate Judge did not dismiss or  
13 attempt to dismiss any separate action as a sanction under the Court’s inherent power,  
14 Hercules Inc. is inapplicable.

#### 15                     4. Reasonableness of Fees

16           Where a sanction is appropriate, the amount of the sanction award must be  
17 reasonable. Matter of Yagman, 796 F.2d 1165, 1184 (9th Cir. 1986). “This is particularly  
18 so where, as here, the amount of the sanction is based upon the attorney’s fees claimed by  
19 the other party.” Id. The Court should avoid issuing a lump-sum sanctions award based on  
20 different sources of authority to sanction and covering a host of misconduct over a period of  
21 time. Id. Rather, the sanctions award must be “quantifiable with some precision and  
22 properly itemized in terms of the perceived misconduct and the sanctioning authority.” Id.

23           “When the sanctions award is based upon attorney’s fees and related expenses, an  
24 essential part of determining the reasonableness of the award is inquiring into the  
25 reasonableness of the claimed fees.” Id. at 1184-85. The Court “must make some  
26 evaluation of the fee breakdown submitted by counsel” to determine not the actual fees and

1 expenses incurred, but what amount of fees and expenses are reasonable. Id. at 1185.  
2 Additionally, the Court should consider the sanctioned party's ability to pay to determine  
3 the award's reasonableness. Id. However, "the sanctioned party has the burden to produce  
4 evidence of inability to pay." Gaskell v. Weir, 10 F.3d 626, 629 (9th Cir. 1993). Failure to  
5 present such evidence or raise the issue below waives the argument regarding inability to  
6 pay. Fed. Election Comm'n. v. Toledano, 317 F.3d 939, 949 (9th Cir. 2002).

7           The sanction here was measured with reference to Flynn's attorneys' fees and  
8 costs. The Magistrate Judge reviewed Flynn's submissions and made several adjustments  
9 from Flynn's requested amount. First, the Magistrate Judge lowered Flynn's requested  
10 hourly rates. (Order (Doc. #985) at 51.) Second, she reviewed Flynn's time entries "line-  
11 by-line" and declined to award fees for work on the fee application that resulted in a  
12 separate award of attorney's fees in March 2008 or for work performed on a separate  
13 motion Flynn filed under Rule 3.3 of the Nevada Rules of Professional Conduct. (Id.)  
14 Third, the Magistrate Judge deducted time for entries that were vague or duplicative. (Id.)

15           The sanctions award is sufficiently itemized, as the Magistrate Judge limited the  
16 sanction to the tasks reflected in Flynn's time sheets related only to defense of the various  
17 different proceedings Montgomery initiated against Flynn. She specifically deducted time  
18 that was, or might be, related to other matters. The Magistrate Judge also reviewed the  
19 reasonableness of the fees, reducing the rate Flynn and DiMare sought for their services,  
20 deducting any vague or duplicative entries, and conducting a "line-by-line" review of  
21 Flynn's time entries. The sanctions award is not a blanket, lump-sum award and it  
22 adequately ties the fees incurred as result of the sanctionable conduct.

23           As to Montgomery's ability to pay, Montgomery did not present any evidence on  
24 his inability to pay, despite the fact that Flynn requested even more in fees than the  
25 Magistrate Judge awarded. Montgomery therefore has waived the argument by failing to  
26 present evidence or raise the argument before the Magistrate Judge. The Court therefore

1 will affirm the sanctions award against Montgomery. The Court denies Flynn's request for  
2 fees in responding to the objections to the Magistrate Judge's sanctions order.

3 4. Reassign

4 "Absent personal bias, remand to a new judge is warranted only in rare  
5 circumstances." United States v. Rapal, 146 F.3d 661, 666 (9th Cir. 1998). To determine  
6 whether reassignment is warranted, the Court must consider:

7 (1) whether the original judge would reasonably be expected upon  
8 remand to have substantial difficulty in putting out of his or her mind  
9 previously-expressed views or findings determined to be erroneous or  
10 based on evidence that must be rejected, (2) whether reassignment is  
advisable to preserve the appearance of justice, and (3) whether  
reassignment would entail waste and duplication out of proportion to  
any gain in preserving the appearance of fairness.

11 Hunt v. Pliler, 384 F.3d 1118, 1126 (9th Cir. 2004) (quotation omitted). "The first two of  
12 these factors are of equal importance, and a finding of one of them would support a remand  
13 to a different judge." Id. (quotation omitted).

14 As an initial matter, Montgomery's request for reassignment is largely moot. The  
15 underlying case has settled and the sanctions proceedings as to Montgomery are now  
16 complete. Consequently, it is unclear whether Montgomery will be a participant in any  
17 further proceedings before the Magistrate Judge. In any event, there is no evidence the  
18 Magistrate Judge would have any difficulty putting out of her mind previously expressed  
19 views on any pertinent matters. Reassignment is not necessary to preserve the appearance  
20 of justice, and reassignment would result in waste and duplication substantially  
21 disproportionate to any perceived gain in preserving the appearance of fairness. The  
22 Magistrate Judge has expended considerable time and effort on these matters, presided over  
23 the evidentiary hearing, and has intimate familiarity with the facts related to this matter.  
24 The Court therefore denies Montgomery's request for reassignment at this time.

25 ///

26 ///



1           **C. Pham**

2           Pham argues the sanctions order violates her due process rights because Pham  
3 was not on notice that she personally might be subject to sanctions. Flynn responds that  
4 Pham had adequate notice and an opportunity to be heard, as he mentioned her by name in  
5 his motion for sanctions, requested her pro hac vice admission be revoked, and described  
6 her conduct in the motion and supporting declaration. Flynn also argues Pham had an  
7 opportunity to be heard because she filed a declaration in support of the Montgomery  
8 parties' opposition to Flynn's motion for sanctions, she testified at the hearing, and she filed  
9 an offer of proof in support of her objections.

10           Prior to imposing sanctions, a Court must provide the party or attorney facing  
11 potential sanctions notice and an opportunity to be heard. Lasar v. Ford Motor Co., 399  
12 F.3d 1101, 1109-10 (9th Cir. 2005); see also Roadway Exp., Inc. v. Piper, 447 U.S. 752,  
13 767 (1980). The Court must give notice as to the potential sanctions, the particular alleged  
14 misconduct, and "the particular disciplinary authority under which the court is planning to  
15 proceed." In re DeVille, 361 F.3d 539, 548 (9th Cir. 2004); Cole v. U.S. Dist. Ct. For Dist.  
16 of Idaho, 366 F.3d 813, 822 (9th Cir. 2004); see also Mendez v. County of San Bernardino,  
17 540 F.3d 1109, 1132 (9th Cir. 2008) ("To the extent the district court was focused on  
18 punishing [counsel] for his trial misbehavior, it was incumbent on the court to give him fair  
19 notice of that personal exposure and obligation to appear in person.").

20           "These minimal procedural requirements give an attorney an opportunity to argue  
21 that his actions were an acceptable means of representing his client, to present mitigating  
22 circumstances, or to apologize to the court for his conduct." Lasar, 399 F.3d at 1110.  
23 Further, the procedural requirements ensure that the attorney has an opportunity to prepare a  
24 defense and explain his or her questionable conduct, that the judge will consider the  
25 propriety and severity of the sanction in light of the attorney's explanation of his or her  
26 conduct, and that "the facts supporting the sanction will appear in the record, facilitating

1 appellate review.” Tom Growney Equip., Inc. v. Shelley Irr. Dev., Inc., 834 F.2d 833, 836  
2 (9th Cir. 1987). The Court need not hold an evidentiary hearing, however, as the  
3 opportunity to brief the issue will suffice to comply with due process. Lasar, 399 F.3d at  
4 1112; Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F.3d 1112, 1118 (9th Cir.  
5 2000).

6 The Magistrate Judge’s sanctions order is contrary to law because the Magistrate  
7 Judge did not provide adequate notice to Pham prior to imposing the sanctions in this  
8 matter. Flynn’s motion for sanctions did not explicitly seek sanctions against Pham.  
9 Flynn’s motion sometimes referenced Montgomery’s counsel in the plural, and discussed  
10 some of the actions Pham took. However, Flynn specifically requested sanctions against  
11 the Montgomery parties “and their counsel of record, Deborah Klar and her firm.” (Mot.  
12 for Sanctions (Doc. #545) at 1.)

13 More importantly, the Magistrate Judge’s order setting the evidentiary hearing  
14 did not advise Pham she may be subject to sanctions personally. The order setting the  
15 evidentiary hearing stated that the hearing would address only two matters, Montgomery’s  
16 September 2007 Declaration and matters related thereto, and the Montgomery parties’  
17 litigation against Flynn in the various other forums. (Order (Doc. #770).) The order setting  
18 the hearing thus was narrower than Flynn’s requested sanctions as set forth in his motion, as  
19 he sought sanctions related to other alleged misconduct. Even if Flynn’s motion could be  
20 read to seek sanctions against Pham, the Magistrate Judge narrowed the scope of Flynn’s  
21 motion and was not considering the full panoply of misconduct or relief set forth in Flynn’s  
22 motion. Consequently, Flynn’s motion alone could not have put Pham on notice that she  
23 personally might be sanctioned.

24 The order setting the hearing also stated the following:

25 4. Dennis Montgomery shall appear in person to testify concerning  
these matters.

26 5. Michael Flynn, Esq., Deborah Klar, Esq., and Terri Pham, Esq.

1 shall attend the hearing in person and shall be prepared to address the  
2 court concerning these matters.

3 (Id.) Although Pham's attendance at the hearing was required, the order does not make  
4 clear that Pham would be required to show cause why she would not be personally  
5 sanctioned or what sanctions she might face. By grouping Pham with Flynn, the party  
6 seeking sanctions, the order setting the hearing did not give Pham adequate notice that she  
7 personally was facing the possibility of sanctions.

8 The text of this order is in contrast to another order to show cause in this case  
9 issued by the Magistrate Judge which made it clear the attorney, as well as her clients, was  
10 facing sanctions. On July 24, 2008, the Magistrate Judge entered an order setting a hearing  
11 "to show cause as to why the Montgomery parties and Deborah A. Klar, counsel for the  
12 Montgomery parties, should not be held in contempt" for failure to comply with one of the  
13 Court's discovery-related orders. (Order (Doc. #769).)

14 The magnitude and scope of the sanctions issued supports this conclusion. The  
15 sanctions order makes Pham jointly and severally liable for over \$200,000 in fees and costs,  
16 and revokes her pro hac vice application, which is the relief referred to in Flynn's motion  
17 for sanctions. However, the sanctions order also bars her from seeking pro hac vice  
18 admission in this Court for five years, publishes the order as a public reprimand, refers  
19 Pham to the Nevada and California Bars, and orders Pham to perform 100 hours of  
20 community service. The order setting the hearing in this matter did not adequately advise  
21 Pham she would be subject to these considerable sanctions.

22 Flynn argues that Pham's due process rights were not violated because she  
23 provided an offer of proof to this Court along with her objection to the Magistrate Judge's  
24 order, and hence she has been afforded an opportunity to be heard. However, Pham's offer  
25 of proof was provided after the Magistrate Judge made her findings. Pham did not have the  
26 opportunity to provide this material to the Magistrate Judge, who was the fact finder in this

1 matter. The undersigned is reviewing the Magistrate Judge's findings on a clearly  
2 erroneous or contrary to law standard. Pham's provision of materials after the fact does not  
3 cure the pre-deprivation due process violation. The Court therefore will sustain Pham's  
4 objections to the Magistrate Judge's sanctions order, without prejudice to any further  
5 proceedings consistent with this Order with respect to Flynn's motion for sanctions.<sup>8</sup>

6 **D. Klar**

7 Klar argues she was not afforded procedural due process protections for the  
8 punitive sanctions set forth in the sanctions order. Flynn responds that Klar received notice  
9 of the charges against her, including the possible revocation of her pro hac vice admission,  
10 as set forth in Flynn's motion for sanctions.

11 The Magistrate Judge's sanctions order is contrary to law because the Magistrate  
12 Judge did not provide adequate notice to Klar prior to imposing the sanctions in this matter.  
13 Flynn's motion for sanctions explicitly sought sanctions against Klar. However, as  
14 discussed above, the Magistrate Judge's order setting the evidentiary hearing was narrower  
15 than Flynn's requested sanctions as set forth in his motion, as he sought sanctions related to  
16 other alleged misconduct. The Magistrate Judge narrowed the scope of Flynn's motion and  
17 was not considering the full panoply of misconduct or relief set forth in Flynn's motion.  
18 Consequently, Flynn's motion alone did not suffice to put Klar on notice as to the sanctions  
19 the Magistrate Judge was considering.

20 As with Pham, although Klar's attendance at the hearing was required, the order  
21 does not make clear that Klar would be required to show cause why she should not be  
22 personally sanctioned or what sanctions she might face. By grouping Klar with Flynn, the  
23 party seeking sanctions, the order setting the hearing did not give Klar adequate notice that  
24

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25 <sup>8</sup> Because the Court affirms Pham's objections on this basis, the Court need not address  
26 Pham's other objections.

1 she personally was facing the possibility of sanctions. Unlike the Magistrate Judge's July  
2 24, 2008 order setting a hearing "to show cause as to why the Montgomery parties and  
3 Deborah A. Klar, counsel for the Montgomery parties, should not be held in contempt," the  
4 order setting the evidentiary hearing on Flynn's motion for sanctions did not adequately  
5 place Klar on notice that she personally may be subject to sanctions.

6 As discussed above, the magnitude and scope of the sanctions issued supports  
7 this conclusion. The sanctions order makes Klar jointly and severally liable for over  
8 \$200,000 in fees and costs and revokes her pro hac vice application, which is the relief  
9 referred to in Flynn's motion for sanctions. But the sanctions order also bars her from  
10 seeking pro hac vice admission in this Court for five years, publishes the order as a public  
11 reprimand, refers Klar to the Nevada and California Bars, and orders her to perform 200  
12 hours of community service. The order setting the hearing in this matter did not adequately  
13 advise Klar she would be subject to these considerable sanctions.

14 Moreover, the sanctions order appears to consider Klar's conduct beyond the two  
15 subjects mentioned in the order setting the hearing. The sanctions order stated that Klar's  
16 misconduct "did not occur in a vacuum; instead it was part of a vexing pattern of conduct  
17 throughout her tenure as lead counsel until she was replaced in July 2008." (Order (Doc.  
18 #985) at 44.) The sanctions order noted that Klar "continued to invite sanctions against her  
19 clients and herself," and discussed subsequent orders of this Court regarding Klar and the  
20 Montgomery parties' failure to abide by this Court's orders, ultimately resulting in sanctions  
21 against Montgomery in the amount of \$2,500 per day. (*Id.* at 44-45.) The Magistrate Judge  
22 may have recounted these events as further support for her findings as to Klar's bad faith in  
23 relation to the two areas of inquiry in the order setting the evidentiary hearing. However, it  
24 is unclear whether the Magistrate Judge was limiting her use of Klar's subsequent conduct  
25 as evidence of her earlier bad faith or as further sanctionable conduct. The Court therefore  
26 will sustain Klar's objections to the Magistrate Judge's sanctions order, without prejudice to

1 any further proceedings consistent with this Order with respect to Flynn's motion for  
2 sanctions.<sup>9</sup>

3 **IV. CONCLUSION**

4 IT IS THEREFORE ORDERED that the Objections of Liner Grode Stein  
5 Yankelevitz Sunshine Regenstreif & Taylor LLP to Order Re: Motion for Sanctions (Doc.  
6 #1035) with supporting declaration (Doc. #1036) are SUSTAINED without prejudice to any  
7 further proceedings consistent with this Order with respect to Flynn's motion for sanctions.

8 IT IS FURTHER ORDERED that the Objections of Dennis Montgomery to  
9 Order Re: Motion for Sanctions (Doc. #1037) are hereby OVERRULED.

10 IT IS FURTHER ORDERED that Teri Pham's Objection to Magistrate Judge's  
11 Order (Doc. #1040) are hereby SUSTAINED without prejudice to any further proceedings  
12 consistent with this Order with respect to Flynn's motion for sanctions.

13 IT IS FURTHER ORDERED that the Objections of Non-Party Deborah A. Klar  
14 to Findings of Magistrate Judge in Stayed Order Re: Motion for Sanctions (Doc. #1042) are  
15 hereby SUSTAINED without prejudice to any further proceedings consistent with this  
16 Order with respect to Flynn's motion for sanctions.

17  
18 DATED: April 5, 2010

19   
20 PHILIP M. PRO  
21 United States District Judge  
22  
23  
24

25 \_\_\_\_\_  
26 <sup>9</sup> Because the Court affirms Klar's objections on this basis, the Court need not address Klar's other objections.